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IN THE Supreme Court of the United States

October Term, 1965
No. 620

MILTON LUROS; BEATRICE B. LUROS; STANLEY E. SOHLER; MELVIN FRIEDMAN; ELMER A. BATTERS; BERNARD J. ABRAMSON; HAROLD STRAUBING; PAUL WISNER, individually and doing business as REGENT HOUSE; SAM MERWIN, JR.; RICHARD E. GEIS; VICTOR J. BANIS; SUN ERA, INC., a California corporation; AMERICAN ART AGENCY, INC., a California corporation; PARLIAMENT NEWS, INC., a California corporation; and LONDON PRESS, INC., a California corporation,

Petitioners,

vs.

WILLIAM C. HANSON, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESERN DIVISION; and UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESTERN DIVISION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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WILLIAM C. HANSON, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESERN DIVISION; and UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESTERN DIVISION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Petitioners pray that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled cause on September 14, 1965.

Opinions Below.

No opinion of the United States Court of Appeals for the Eighth Circuit was rendered in connection with the order and judgment made by the Court of Appeals,

annexed hereto as Appendix "A". The opinion of the Honorable William C. Hanson, a Judge of the United States District Court for the Northern District of Iowa, Western Division, is unreported, and is printed in Appendix "B" hereto.

Jurisdiction.

The order and judgment of the United States Court of Appeals for the Eighth Circuit was entered on September 14, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

The petitioners are charged under a 25-count indictment with violations of the federal obscenity statutes 18 U.S.C. 1461 and 1462, as amended. The indictment was returned in the Northern District of Iowa, Western Division, a distance of over 1,500 miles from the residences and places of business of petitioners. On a motion made by the petitioners prior to trial to dismiss the indictment on the ground, among others, that the books and writings named in the indictment were not obscene and, therefore, protected by the provisions of the First Amendment, the District Judge held that the legal and constitutional issues thus raised by petitioners could not legally be considered by the District Judge, that the court did not have any duty to decide whether the books and other writings named in the indictment are within the protection of the First Amendment; that the District Judge must assume on a motion to dismiss that the material named in the indictment is obscene, and for these reasons the District Judge declined to exercise an independent constitutional judgment with respect to the material.

The questions presented are as follows:

1. Whether the District Judge, under the aforesaid circumstances, had the jurisdiction and was under the duty and constitutional obligation to determine whether or not the material named in the indictment is entitled to protection under the First Amendment.

2. Whether mandamus by a Court of Appeals is the appropriate remedy to compel a District Judge to perform the duty and constitutional obligation of determining the issue of constitutional protection for material named in an indictment under the federal obscenity statutes where such issue is raised by the accused on an appropriate motion to dismiss the indictment prior to trial.

3. Whether the action of the District Judge, in refusing to decide the legal and constitutional issues raised on the motion to dismiss the indictment as aforestated, constituted a repudiation of jurisdiction and legal duty, a manifest abuse of discretion and a deprivation of petitioners' liberty and property without due process of law and the abridgment of freedoms of speech and press, contrary to the provisions of the First, Fifth and Sixth Amendments to the Constitution of the United States.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth and Sixth Amendments to the Constitution, and the provisions of 28 U.S.C. 1651(a) are printed in Appendix "C" hereto.

Statement of the Case.

On March 24, 1965, a prosecution was instituted against the petitioners in the United States District Court for the Northern District of Iowa, Western Division, charging in a 25-count indictment violations of the federal obscenity statutes, 18 U.S.C. 1461 and 1462. *United States v. Luros, et al.,* Criminal No. 65-Cr-3007-W.[1]

The petitioners named in the indictment aforesaid include publishers, distributors, editors, photographers, authors and other persons engaged in the exercise of speech and press ordinarily protected by the provisions of the First Amendment. Petitioners are residents and citizens of the State of California and doing business therein, except petitioner Geis who resides in the State of Oregon. None of the petitioners reside in the Northern District of Iowa, Western Division. The only reason for the return of the indictment in the Northern District of Iowa, Western Division, against these petitioners appears to be the alleged mailing, carriage and delivery by these petitioners of a minimal number of books and other writings to persons and establishments in the said Judicial District of Iowa.

Following arraignment and plea, and on or about May 14, 1965, petitioners moved, in the Northern District of Iowa, Western Division, to dismiss the aforesaid indictment upon the grounds generally, that each of the counts failed to state facts sufficient to constitute

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[1]A copy of the indictment is annexed to the petition for writ of mandamus below as Exhibit "A", and contained in the certified transcript of record filed with this petition for a writ of certiorari.

an offense against the United States; that the statutes, on their face and as construed and applied by the indictment, violated the rights of petitioners under the Constitution of the United States; and upon other legal and constitutional grounds. The motion was based upon specified Federal Rules of Criminal Procedure, upon specific statutory constitutional provisions, upon a brief in support of the motion and upon the indictment and all proceedings theretofore had.[2]

The principal contention urged by petitioners upon the District Court in support of the motion to dismiss the indictment was as follows: the books and magazines named in the indictment are not obscene nor otherwise unlawful, and the material is therefore entitled to constitutional protection under the First Amendment to the Constitution. On a motion to dismiss an indictment in a federal obscenity prosecution, it was argued, a District Court must exercise an independent constitutional judgment with respect to the material named in the indictment and, if the District Court concludes that the material is entitled to constitutional protection, then the indictment must be dismissed.

The motion to dismiss the indictment made by petitioners came on for hearing and argument in the United States District Court for the Northern District of Iowa, Western Division, before Honorable William C. Hanson, Judge of the United States District Court for the Northern District of Iowa, Western Division, on or about May 21, 1965.

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[2]A copy of the motion to dismiss the indictment is annexed to the petition for writ of mandamus below as Exhibit "B", and contained in the certified transcript of the record filed with this petition for a writ of certiorari.

On June 29, 1965, said District Judge Hanson rendered a memorandum and order denying petitioners' motion to dismiss the indictment (Appendix "B").

The District Court held that the issue presented by petitioners was "not before the Court on this motion". The District Court stated that on a motion to dismiss the indictment, the statement contained in the indictment that the books and magazines were obscene must be "taken to be true".

The District Court recognized that appellate courts must make an independent constitutional judgment on the issue of obscenity. The District Court, however, held that such constitutional duty does not fall upon a trial court on a motion to dismiss an indictment, even though the specific issue as to the obscenity or nonobscenity of the material named in the indictment is specifically raised by the accused. The District Court held that any issue with respect to the alleged obscenity of the writings or the constitutional protection afforded the said writings must await the actual trial of the case.

In the decision denying the motion to dismiss the indictment, the District Court conceded that the Court had before it books and magazines allegedly named in the indictment, and that petitioners had specifically requested the Court to determine whether or not the said writings were entitled to the protection of the First Amendment.

Thus, the District Court refused to determine the constitutional issue raised by petitioners on the motion to dismiss the indictment, and construed the decision of this Court in *Jacobellis v. Ohio,* 378 U.S. 184, as

placing no obligation or duty upon the District Court to make such determination.

On July 28, 1965, the aforesaid District Judge William C. Hanson made an order setting the case against petitioners down for trial with jury in the United States Court House at Sioux City, Iowa, on October 18, 1965.[3]

On or about September 1, 1965, petitioners filed a petition for writ of mandamus in the United States Court of Appeals for the Eighth Circuit. The petitioners prayed that a writ issue requiring District Judge Hanson to show cause why mandamus should not issue directing the said District Judge to vacate and set aside the order denying petitioners' motion to dismiss the indictment, and further directing the said District Judge to order rehearing and reargument of the motion to dismiss, and upon said rehearing and reargument to determine whether the books and writings named in the indictment are obscene within the purview of 18 U.S.C. 1461 and 1462, or whether the said books and other writings are protected by the provisions of the First Amendment to the Constitution.

On September 14, 1965, the United States Court of Appeals for the Eighth Circuit denied petitioners' request for the aforesaid show cause order and dismissed the petition for writ of mandamus (Appendix A).

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[3]A copy of the order is annexed to the petition for writ of mandamus below as Exhibit "D", and contained in the certified transcript of the record filed with this petition for a writ of certiorari.

Reasons for Granting the Writ.

1. It is respectfully submitted that where the accused, under an indictment charging violations of the federal obscenity statutes 18 U.S.C. 1461 and 1462, moves to dismiss the indictment upon the ground that the books and other writings named in the indictment are not obscene and entitled to the protection of the First Amendment, a District Court has the jurisdiction and is under the duty and constitutional obligation to determine the issue thus raised by the accused. This obligation and duty to render an independent constitutional judgment, as soon as the issue is appropriately raised by the accused, arises as a safeguard for the exercise of freedoms of speech and press and for the public's access to constitutionally protected material.

In *Jacobellis v. Ohio,* 378 U.S. 184, this Court explicitly enunciated the duty and obligation of the Judiciary to render an independent constitutional judgment in obscenity prosecutions. "The Supreme Court is subject to that obligation, *as is every court before which the constitutional issue is raised.*" 378 U.S. at 188, n. 3 (emphasis added).

The aforesaid constitutional principle is a fundamental safeguard for the exercise of freedoms of speech and press. In a line of decisions which run from *Roth v. United States,* 354 U.S. 476, decided in 1957, to *Jacobellis v. Ohio,* 378 U.S. 184, decided in 1964, this Court has emphasized that the determination of whether a book, writing or other medium of communication is obscene is a task of great constitutional importance. The decisions of this Court have stressed that the application of an obscenity law to suppress books, writings

or other media of communication requires procedural and substantive safeguards for the ascertainment of the line which separates "obscenity" from constitutionally protected expression. *Speiser v. Randall,* 357 U.S. 513.

Hence, the determination of whether a book or other expression is obscene cannot be treated as a purely factual judgment on which a jury's verdict or the ruling of state and federal lower courts can be deemed conclusive or even compelling. In short, the power of the Federal Government to suppress obscenity is limited by the constitutional protections for free expression, and the question whether a particular work is obscene, therefore, "necessary implicates an issue of constitutional law" *Jacobellis v. Ohio,* 378 U.S. at 188.

2. It is plain that under the rule of *Jacobellis* and the requirements of the First Amendment, a trial court in a federal obscenity prosecution is required to make an independent constitutional judgment with respect to the material involved therein. Petitioners submit that this duty and obligation on the part of the trial court under the Constitution of the United States and the principles enunciated by this Court to render an independent constitutional judgment arises as soon as the issue is appropriately raised by an accused, to wit, by a motion to dismiss the indictment prior to trial, as in the case herein.

This Court has constantly emphasized that criminal or civil proceedings involving an attempted suppression of books, writings or other media of communication are in themselves potential hazards to constitutionally protected material. The very institution of criminal or civil proceedings may have a chilling effect on protected

expression. See, *Freedman v. Maryland,* 380 U.S. 51; *A Quantity of Copies of Books, et al. v. Kansas,* 378 U.S. 205; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58; *Marcus v. Search Warrants of Property etc.,* 367 U.S. 717; *Smith v. California,* 361 U.S. 147. See also, *Dombrowski, et al. v. Pfister,* 380 U.S. 479; *New York Times Co., et al. v. Sullivan,* 376 U.S. 254; *Garrison v. Louisiana,* 379 U.S. 64.

The Court has emphasized that in obscenity prosecutions, just as in prosecutions involving other areas of speech and press, there is necessarily some abridgment of speech and press whenever a criminal or civil prosecution is commenced involving books, writings and other media of communication. The obligation of the courts is to act promptly to determine the issues in order that this abridgment and curtailment of the free circulation of the press shall be reduced to an absolute minimum. This Court has stressed that the duty and obligation to act promptly is cast upon the courts by reason of the provisions of the First Amendment and the need for safeguarding not only an individual's exercise of freedoms of speech and press *but the right of the entire community to access to constitutionally protected material.* Where an accused has moved to dismiss the indictment as is his right under the rules and laws of the United States, it is the plain duty of the trial court, it is submitted, immediately to pass upon the constitutional issues raised by the accused with respect to the lawfulness of the material named in the indictment.

3. The lower federal and state courts have accepted the principle that trial courts are under a duty to render an independent constitutional judgment in obscenity

prosecutions as soon as the issue is appropriately raised by an accused.

Thus, on June 24, 1965, District Judge Templar, in a written opinion, granted a motion to dismiss a 22-count indictment, prior to trial, charging violations of the federal obscenity statute. *United States v. Linetsky,* No. T-CR-582 (D.C. Kansas).[4] The same District Judge, on June 29, 1965, rendered a written opinion disposing of a 22-count indictment, prior to trial, charging the mailing of allegedly obscene movie films. *United States v. Wasserman,* No. T-CR-5811 (D.C. Kansas).[5] The two Kansas indictments had been returned against defendants who were residents of the State of California.

In *United States v. Frew, et al.,* No. Criminal 39714 (D.C. Michigan), District Court Judge Kaess, prior to trial, granted a motion to dismiss a 33-count indictment returned under 18 U.S.C. 1461 and 1462 upon the ground that the material involved was not obscene in the light of United States Supreme Court decisions.[6] In this case also, the Michigan indictment had been returned against a resident of the State of California. See, *Steiner and Frew v. Hocke,* 272 F. 2d 384 (9 Cir. 1959), involving suits in equity instituted in Cali-

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[4]A copy of the opinion is annexed to the brief in support of the petition for writ of mandamus as Exhibit "A", and contained in the certified transcript of the record filed with this petition for a writ of certiorari.

[5]A copy of the opinion is annexed to the brief in support of the petition for writ of mandamus as Exhibit "B", and contained in the certified transcript of the record filed with this petition for a writ of certiorari.

[6]A copy of the opinion is annexed to the brief in support of the petition for writ of mandamus as Exhibit "C", and contained in the certified transcript of the record filed with this petition for a writ of certiorari.

fornia seeking to restrain removal proceedings to Michigan.

On June 14, 1965, the Honorable Joseph A. Sprankle, Jr., a Judge of the Superior Court for the State of California, in and for the County of Los Angeles, in *People v. Luros, et al.,* No. 295183, dismissed a count of an obscenity indictment, prior to trial, which alleged that certain named books were obscene. The Court found that none of the books involved exceeded customary community standards nor were any of the books utterly without redeeming social importance.[7]

See also, *People v. Birch, et al.,* 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (N.Y. S. Ct. 1963), dismissing an obscenity indictment upon the ground that the material involved was not obscene; and *People v. Druss,* New York Superior Court Cr. No. 43-63 (decided September 6, 1963), also dismissing an obscenity indictment because the named books were deemed constitutionally protected.

The United States Court of Appeals for the Second Circuit rendered a decision on July 15, 1965, in the case of *United States v. Klaw and Kramer,* which also bears importantly on the issue here involved. In the *Klaw* case, the Court of Appeals, in reversing judgments of conviction under the federal obscenity statutes, emphasized that "the responsibility of protecting defendants from unguided suppression and conviction weights as heavily" upon lower federal courts as it does upon the United States Supreme Court. The Court of Appeals stated that the most cursory perusal of the

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[7]A copy of the opinion is annexed to the brief in support of the petition for writ of mandamus as Exhibit "D", and contained in the certified transcript of the record filed with this petition for a writ of certiorari.

decided cases makes it obvious that abnegation of the courts of judicial supervision in the "obscenity" field would be inconsistent with the duty of a court to uphold constitutional guarantees. The Court held that there is no justification in the argument that determinations as to whether writings are obscene or constitutionally protected can be safely left to a jury. The Court of Appeals emphasized that unless courts make independent constitutional judgments as to whether material involved in obscenity prosecutions is constitutionally protected, "a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity."[8]

It is therefore plain that lower federal and state trial courts have recognized the obligation and duty of such courts to make an independent constitutional judgment with respect to material charged to be obscene as soon as the issue is appropriately raised prior to trial. These courts have followed the mandate of the First Amendment as interpreted by the decisions of this Court. The trial courts understand that books and other writings facing indictment and suppression have already undergone a form of censorship without any prior judicial determination, and that the duty rests upon the courts to make immediate determination with respect to the alleged obscenity or nonobscenity of the material involved in order to safeguard the public's access to constitutionally protected material without protracted delay. See also, *Russell, et al. v. United States,* 369 U.S. 749, 768-769, and Note 15.

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[8]A copy of the opinion is annexed to the brief in support of the petition for writ of mandamus as Exhibit "E", and contained in the certified transcript of the record filed with this petition for a writ of certiorari.

4. Moreover, the petitioners herein are being prosecuted under 18 U.S.C. 1461 and 1462, as amended on August 28, 1958 (Pub. L. 85-796, §§1 and 2, 72 Stat. 962.) The effect of these amendments to the federal obscenity statutes was to punish as continuing offenses the use of the mails or the use of interstate carriers of alleged obscene material. The constitutional validity of these statutes, as amended, under the First Amendment, has never been passed upon by this Court. The federal obscenity statutes, as amended, have opened the door to abuses which create an inhibiting effect upon the circulation of the press and a derogation of the public's access to constitutionally protected material. The statutes, as amended, purport to permit the Department of Justice to pick any judicial forum in the United States for the institution of obscenity prosecutions.

Book publishers and distributors, as well as printers, authors and others involved in the circulation of the press, are being increasingly subjected to prosecutions under the statutes, as amended, in far off jurisdictions where the so-called impact of the material has been minimal, that is, where in the course of national distribution throughout the country the books or other writings sent to the particular area have been extremely small, and this known to the Government.

It has become plain that the statutes are now being used by some federal prosecutors to place the greatest financial strain upon publishers, distributors and other persons, to make it impossible to bring witnesses and experts in defense of the accused and to impose such burdens as will finally put the different publishers and distributors out of business even though such publish-

ers and distributors may be ultimately successful in vindicating their rights.[9]

Indeed, there is reason to believe that these prosecutions in far off jurisdictions—the prosecution here is more than 1,500 air miles from petitioners' residences and places of business—are being instituted with knowledge on the part of the prosecutors that the material involved is clearly constitutionally protected. To flaunt the decisions of this Court and to institute prosecutions for the sole purpose of placing such financial burdens upon publishers and distributors of books and other writings as to put them out of business is hardly

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[9]A number of examples may be cited. On April 2, 1958, an indictment was returned against one Sanford E. Aday in the United States District Court for the Southern District of California, Northern Division (Fresno, No. 35-45-N.D. Crim.). The indictment was returned shortly before the amendment to 18 U.S.C. 1461, and was therefore brought in the district where the books were allegedly deposited for mailing. See, *United States v. Ross,* 205 F. 2d 619 (10 Cir. 1953). There was a jury trial in which there was an acquittal on one count and disagreement on other counts. The Government thereafter moved to dismiss the counts on which there had been disagreement and the entire indictment was finally dismissed as to all counts on February 6, 1959.

Following the amendments to 18 U.S.C. 1461 and 1462, the same defendant Aday was charged with violations of the federal obscenity statute under indictments returned (a) in the District of Arizona (U.S.D.C. No. C-15596 Phoenix); (b) in the Western District of Michigan, Southern Division at Grand Rapids (Crim. No. 6615); (c) in Honolulu, Hawaii (U.S.D.C. for the District of Hawaii, Cr. No. 11510); and (d) in Houston, Texas (U.S.D.C. for the Southern District of Texas, Houston Division, Criminal No. 65-H-80).

On or about September 10, 1965, a 26-count indictment was returned in Houston, Texas against corporate and individual defendants residing and doing business in the State of California. *United States v. Hamling, et al.* (U.S.D.C. for the Southern District of Texas, Houston Division, CR. No. 64-H-12).

These examples of oppressive actions under 18 U.S.C. 1461 and 1462, as amended, are only a few examples of many which could be cited.

consistent with the fundamental guarantees of the Constitution. There are grounds for believing that some federal prosecutors are following a policy of expediency advocated by officials impatient with constitutional restraints.[10]

Prosecution under the indictment here will clearly subject petitioners to heavy and onerous physical and financial burdens and seriously undermine opportunities for a fair trial and opportunities to obtain witnesses in their defense. Petitioners are therefore being put to the trouble, expense and anxiety of a public trial in a forum over 1,500 miles from their residences, families and places of business, without an opportunity to have the constitutional and legal questions relative to the material involved rightfully decided on a motion to dismiss the indictment prior to trial.

If petitioners are deprived of their legal and constitutional rights and the trial court is upheld in its refusal to exercise its jurisdiction and perform its constitutional duty, the hardship and burdens will have been irretrievably visited upon petitioners and the censorship of the material will be achieved, regardless of whether petitioners are eventually acquitted at the trial of the ac-

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[10]Thus, it was recently reported:

"Rep. Dowdy advocated getting local authorities to prosecute sellers of nudie magazines and other offensive publications and exhibitors of films they believe obscene, even if it is known that under Supreme Court interpretations of law no convictions can be gained. Dowdy said in this way exhibitors and others would simply give up because the receipts would be less than the expense."

The Hollywood Reporter, March 24, 1965.

See also, the statement of Rep. Dominick V. Daniels of New Jersey, at hearings before a House Subcommittee, urging the Justice Department to make "more arrests" in order to hit persons "in the pocketbook". Los Angeles Times, September 3, 1965, Part 1, p. 6, col. 1.

tion or whether their constitutional rights are ultimately vindicated on appeal if conviction should result.

Not only are the safeguards for the freedoms of speech and press thus undermined by the refusal of the trial court to exercise its independent constitutional judgment on a motion to dismiss the indictment, but this failure to perform a required judicial duty is inconsistent with the true administration of criminal justice in the federal courts and contrary to civilized standards of procedure in criminal cases. *Cf., McNabb v. United States,* 318 U.S. 332.

5. Mandamus traditionally lies to compel lower courts to exercise their authority when it is their duty to do so. The writ issues to enforce clear legal and constitutional rights and where trial courts have misjudged their powers and grossly abused their discretion. The writ will also issue where an accused may be put to such hardships and difficulties by denial of clear legal and constitutional rights that a court's ultimate appellate jurisdiction will be defeated. *Schlagenhauf v. Holder,* 85 S. Ct. 234; *United States Alkali Association v. United States,* 325 U.S. 196, 202; *Los Angeles Brush Co. v. James,* 272 U.S. 701; *McCullough v. Cosgrave,* 309 U.S. 634; *La Buy v. Howes Leather Co.,* 352 U.S. 249, 256; *In re Simons,* 247 U.S. 231; *In re 620 Church Street Bldg. Corp.,* 299 U.S. 24; *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500; *In re Peterson,* 253 U.S. 300, 305; *United States v. United States District Court,* 334 U.S. 258, 263; *Ex parte Kowoto,* 317 U.S. 69. See also, *Minnesota Mining & Mfg. Co. v. Platt,* 345 F. 2d 681 (7 Cir. 1965).

It is respectfully submitted, therefore, that a writ of mandamus should have issued from the court below

directed to the respondent Court requiring the Court to show cause why the relief prayed for in the petition for writ of mandamus should not be granted. The constitutional and legal issues involved are of great public importance and require speedy resolution in the light of the requirements of the Constitution and the authoritative decisions of this Court.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY FLEISHMAN and
PERCY FOREMAN,
Counsel for Petitioners.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Order and Judgment of Court of Appeals Dismissing Petition for Writ of Mandamus.

United States Court of Appeals for the Eighth Circuit.

No. 18143. September Term, 1965.

Milton Luros, et al., Petitioners, vs. William C. Hanson, Judge of the United States District Court for the Northern District of Iowa.

On Petition for Writ of Mandamus.

On consideration of the pending petition for writ of mandamus, it is now here ordered:

1. That petitioner's request for an order directing respondent to show cause why Writ of Mandamus should not issue should be, and it is hereby, denied.

2. The Petition for Writ of Mandamus is hereby dismissed.

September 14, 1965

APPENDIX B.

Opinion and Order of Honorable William C. Hanson Denying Motion to Dismiss Indictment.

United States District Court for the Northern District of Iowa, Western Division.

Filed June 29, 1965. Sioux City Office, Western Division, Northern District of Iowa.

United States of America, Plaintiff, v. Milton Luros, et al., Defendants. Criminal No. 65-Cr-3007-W.

MEMORANDUM AND ORDER.

On March 24, 1965, a grand jury for this District returned an indictment in twenty-five counts against the defendants. Count 1 charges a violation of Section 371, Title 18, United States Code, in that all of the defendants conspired together to violate the federal obscenity statutes. Counts 2 through 8, 10 through 12, and 19 through 25 charge that certain defendants used the mails for the carriage and delivery of obscene books and magazines in violation of Section 1461 of Title 18. Additional violations of Section 1461 are charged in Counts 9 and 15 in that certain defendants used the mails for the carriage and delivery of advertisements giving information where, how, from whom, and by what means obscene books and magazines might be obtained. Counts 13, 14, and 16 through 18 charge that certain defendants used a common carrier for carriage of obscene magazines in interstate commerce in violation of Section 1642 of Title 18. Each substantive count alleges that the obscene matter was mailed or shipped from North Hollywood, California, to a point in this District.

I.

The defendants have filed a motion to dismiss the indictment in which they allege numerous grounds for dismissal of the indictment and the individual counts thereof. They strongly urge that the Court rule at this time on the obscenity of the books and magazines named in the indictment. The Court has received from defendants' counsel several books and magazines. The defendants state that these are the books and magazines that are alleged to be obscene and that they are the basis for the indictment. The Court observes that the titles on the books and magazines received correspond to the titles stated in the indictment. However, the Court expresses no opinion as to whether this is the allegedly obscene matter or whether it is in fact obscene and outside the protection of the First Amendment. Although the greater part of the defendants' brief is devoted to an argument of their view of the constitutional standards for determining the issue of obscenity, that issue is not before the Court on this motion.

A motion to dismiss the indictment is not a device for a summary trial of the evidence. The sole function of this motion is to test the sufficiency of the indictment to charge an offense. United States v. Sampson, 371 U.S. 75 (1962). The sufficiency of the indictment must be determined from the words of the indictment, and the Court is not free to consider evidence not appearing on the face of the indictment. In ruling on this motion, all well-pleaded facts are taken to be true. United States v. South Florida Asphalt Co., 329 F. 2d 860 (5th Cir. 1964); Padilla v. United States, 278 F. 2d 188 (5th Cir. 1960).

The indictment in this case charges that the books and magazines are obscene. The defendants disagree. But on this motion to dismiss, that statement is taken to be true. The resolution of the dispute about the facts must await the trial. At this state of the case, no books or magazines have been admitted in evidence, and no evidence has been received on the other factors that must be considered in making a judgment on the issue of obscenity.

For support of their contention, the defendants rely on Jacobellis v. Ohio, 378 U.S. 184 (1964). In his opinion, Mr. Justice Brennan quotes from Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 116 (1960):

> " 'This obligation—to reach an independent judgment in applying constitutional standards and criteria to constitutional issues that may be cast by lower courts "in the form of determinations of fact"—appears fully applicable to findings of obscenity by juries, trial courts, and administrative agencies. The Supreme Court is subject to that obligation, as is every court before which the constitutional issue is raised.' " 378 U.S. at 188, note 3.

This quotation is part of an analysis of the role of the Supreme Court in obscenity cases. It had been suggested that the issue of obscenity should be treated as a factual judgment on which the jury's verdict is all but conclusive, or that the determination should be left to the lower courts with only limited review by the Supreme Court. The Court rejected this view as inconsistent with its duty to uphold constitutional guaran-

tees. The appellate courts must make an independent judgment on the issue of obscenity. This court does not now decide the extent to which this court may have a similar duty when the issue is properly presented to it. However, that issue is not now before this court. Nothing in *Jacobellis v. Ohio* indicates an intent of the Supreme Court to overrule the established rule that well-pleaded facts must be taken as true on a motion to dismiss the indictment.

The question whether a particular book or magazine is within the protection of the First Amendment requires a delicate constitutional judgment. This is not a judgment that can be made at a high level of abstraction. An independent evaluation must be made of the facts of each case. Jacobellis v. Ohio, supra. The facts of an obscenity case cannot be adequately judged by a mere reading of the indictment supplemented by the defendants' informal offer of evidence.

If the Court were now to rule on the obscenity of these books and magazines and grant the defendants' motion to dismiss the indictment, an equally intolerable situation would result on appeal. A decision on the issue of obscenity involves considerations of fact as well as of law, but the appellate courts would be called upon to review that decision on a record devoid of evidence. In United States v. Fruehauf, 365 U.S. 146 (1961), the trial court did what the defendants would have this Court do in this case. It dismissed an indictment that was valid on its face because the court anticipated that the evidence would not prove the offense charged. On appeal, the Supreme Court remanded the case for trial, stating that an appeal at that preliminary stage was merely a request for an advisory opinion.

On this motion to dismiss the indictment, the Court assumes that the allegation of obscenity is true. If the evidence fails to prove the charge of obscenity or any other element of the offenses, the Court will rule on that issue when it arises.

II.

The defendants challenge the sufficiency of the indictment on the ground that it does not contain all the essential ingredients of an obscenity indictment. The indictment charges, in the statutory language, that the books and magazines are "obscene, lewd, lascivious, indecent, and filthy." The defendants contend that a valid obscenity indictment must charge: (1) that the particular book or other communication involved substantially exceeds customary limits of candor, in the nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; (2) that the dominant theme of the material taken as a whole appeals to the prurient interest of the average person; (3) that the material involved is utterly without ideas, or literary, or scientific, artistic value, or any other form of social importance; (4) that the accused know that the particular book or other writing involved is obscene, that is, substantially exceeds contemporary community standards in the nation as a whole, appeals to prurient interest, and is utterly without social importance.

It is apparent that the defendants' first three "essential ingredients" merely represent the defendants' version of the legal definition of obscenity. But an indictment need not allege the definition of legal terms. A charge that books and magazines are obscene necessarily refers to and incorporates the legal definition of obscenity.

An indictment is sufficient if it (1) alleges all of the elements of the offense, (2) fairly informs the defendants of that which they must be prepared to meet in the preparation of their defense, and (3) enables them to plead an acquittal or a conviction in bar of future prosecutions for the same offense. Hagner v. United States, 285 U.S. 427 (1932); United States v. Debrow, 346 U.S. 374 (1953); Stapleton v. United States, 260 F. 2d 415 (5th Cir. 1958); United States v. Bagdasian, 291 F. 2d 163 (4th Cir. 1961). This indictment satisfies each of these requirements.

An indictment that charges an offense in the words of the statute is sufficient if the words of the statute contain all the elements of the offense. Babb v. United States, 218 F. 2d 538 (5th Cir. 1955); United States v. Palmiotti, 254 F. 2d 491 (2d Cir. 1958); United States v. Foster, 253 F. 2d 457 (7th Cir. 1958).

The exception to this rule is illustrated by the recent case of Russell v. United States, 369 U.S. 749 (1962). Speers v. State 33 L.W. 2604 (Supreme Ct. Miss.). In the *Russell* case, the indictment charged in the words of the statute that the defendants refused to answer questions that "were pertinent to the question then under inquiry" by a committee of Congress. The Supreme Court held the indictment to be insufficient because it did not state the subject which was under inquiry. The Supreme Court stated:

> "The very core of criminality under 2 U.S.C. 192 is pertinency to the subject under inquiry of the questions which the defendant refused to answer. What the subject actually was, therefore, is central to every prosecution under the statute. Where guilt depends so crucially upon a specific identifi-

cation of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute."

The present case involves different considerations. The definition of obscenity is a question of law rather than of fact. Unlike the question under inquiry before the Congressional committee the definition of obscenity does not change with each indictment. The allegation of obscenity in the words of the statute is sufficient.

An obscenity indictment need not charge that the defendants know the books and magazines were obscene. The indictment must charge that the defendants had knowledge of the contents of the books and magazines they distributed. Smith v. California, 361 U.S. 147 (1959). However, the defendants' belief as to the obscenity of the books and magazines is irrelevant. Rosen v. United States, 161 U.S. 29 (1896); Kahm v. United States, 300 F. 2d 78 (5th Cir. 1962); Schindler v. United States, 208 F. 2d 289 (9th Cir. 1953).

The indictment charges that the defendants "knowingly" distributed the books and magazines through the mails and interstate commerce. The word "knowingly" indicates knowledge of all the essential facts, including the contents of the books and magazines. No further allegation of knowledge is necessary. Price v. United States, 165 U.S. 311 (1897); Rosen v. United States, 161 U.S. 29 (1896); United States v. Martinez, 73 F. Supp. 403 (M.D. Pa. 1947).

III.

Obscenity is not speech or press within the protection of the First Amendment. Roth v. United States, 354 U.S. 476 (1957).

The venue provisions of Sections 1461 and 1462 are within the legislative discretion of Congress. Use of the mails or interstate commerce may involve acts in several states as part of the same offense. Congress may make such use a continuing offense. Where, as in this case, a continuing offense is charged, the defendant may be prosecuted in the district of deposit, in the district of delivery, or in any district through which the obscene material passed. Travis v. United States, 364 U.S. 631 (1961); United States v. Corez, 356 U.S. 405 (1958); United States v. West Coast News Co., 30 F.R.D. 13 (W.D. Mich. 1962).

The standards for judging the obscenity of the books and magazines are the same in this district as they are in any other district. Jacobellis v. Ohio, supra. The defendants' rights are fully protected under the venue provisions of Sections 1461 and 1462.

IV.

Count 1 of the indictment charges a violation of Section 371 of Title 18 in that the defendants conspired to violate Sections 1461 and 1462. This count charges a single conspiracy even though the object of the conspiracy was to commit several offenses. This is a single offense, and the count is not duplicitous. Braverman v. United States, 317 U.S. 49 (1942); Williams v. United States, 238 F. 2d 215 (5th Cir. 1956).

Count 1 is not barred by the five-year statute of limitations. The indictment must allege only that the conspiracy was in existence and that at least one overt act was committed by one of the conspirators in this district during the period of limitations. Grunewald v. United States, 353 U.S. 391 (1957). The defendants'

contention that the application of the conspiracy statute in an obscenity prosecution is unconstitutional is without merit. Obscenity is not protected by the First Amendment. Roth v. United States, 354 U.S. 476 (1957).

Counts 9 and 15 charge that certain defendants used the mails for the delivery of a letter and a magazine, each containing an advertisement giving information where, how, from whom, and by what means obscene books and magazines might be obtained. It is not necessary that the indictment set out the language of the advertisements. Bartell v. United States, 227 U.S. 427 (1913); United States v. Schallaci, 166 F.Supp. 303 (S.D.N.Y. 1958); c.f. Speers v. State, supra.

V.

The defendants state in their brief that some of the defendants were indicted in a state court in California on obscenity charges involving the nudist magazines named in Counts 3, 5, 7, and 8 of this indictment. They further state that a judge of the California court dismissed a count of the California indictment based on those nudist magazines. Assuming these statements to be true and assuming that the California court found the magazines to be not obscene, the defense of double jeopardy is nevertheless inapplicable. The defendants were never placed in jeopardy under the state indictment because the indictment was dismissed before trial. Hunter v. Wade, 169 F. 2d 973 (10th Cir. 1948); Hurst v. California, 211 F. Supp. 387 (N.D. Cal. 1962).

Even if the defendants had been placed in jeopardy under the California indictment, this prosecution would not constitute double jeopardy because the two prose-

cutions are by different governments and under different laws. Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959).

The determination of the California court on the obscenity of the nudist magazines is not res judicata in this case. The doctrines of res judicata and collateral estoppel apply only to actions involving the same parties. The United States was not a party to the California prosecution, and its power to enforce its criminal laws cannot be affected by the decision of a state court in a case to which it was not a party. Smith v. United States, 243 F. 2d 877 (6th Cir. 1957).

VI.

The defendants state that this prosecution is an unfair use of the criminal law and that it is contrary to civilized standards of criminal justice. However, the defendants' brief does not indicate their basis for this charge. It appears that this charge is only a reassertion of the defendants' belief that the books and magazines involved in this indictment are not obscene. This is not a proper time for determination of that issue.

The defendants have supplied the court with opinions or orders from several courts wherein the judge ruled on the issue of obscenity on a motion to dismiss or summary judgment. Those cases are: People v. Luros, et al. (Criminal No. 295183 Calif. Sup. Ct.); Royal News Co. v. Schultz and Moore (Civil No. 23095, U.S. D.C. for E.D. Mich.); United States v. Frew (Criminal No. 39714, U.S.D.C. for E.D. of Mich.). The *Royal News* case was adjudicated on summary judgment. The same was in effect true in *People v. Luros* because the veil of the indictment was pierced. *Frew* was based on a motion to dismiss.

This court is not convinced that in a criminal matter the action can be adjudicated in this type of proceeding which is in effect a summary judgment proceeding. In the interest of justice, of course, criminal procedure should be the same in all jurisdictions. Nonetheless, the court cannot follow the procedure apparently used in the *Frew* case. This court believes that it is in the best interest of all criminal actions to hear all the evidence and not to pierce the indictment on a motion to dismiss.

The Court finds that the indictment is sufficient. Accordingly, IT IS HEREBY ORDERED that the defendants' motion to dismiss the indictment and every separate part thereof is denied.

Dated: June 29, 1965.

By the Court:

/s/ William C. Hanson

William C. Hanson

United States District Judge.

APPENDIX C.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitutions are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law, . . ."

3. The pertinent provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . ."

4. The provisions of 28 U.S.C. 1651(a) are:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the useages and principles of law."

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 620

MILTON LUROS, et al., PETITIONERS

v.

WILLIAM C. HANSON, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals dismissing the petition for a writ of mandamus (R. 143; Pet. App. A) is not reported. The opinion and order of the district court denying the motion to dismiss is set out in the Record at pp. 40-57 and in Petitioner's Appendix "B" pp. 2-12.[1]

[1] This opinion is incorporated in the broader ruling of the district court denying various pre-trial motions of petitioner. See *United States* v. *Luros*, 243 F. Supp. 160.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1965 (R. 143; Pet. App. A). The petition for a writ of certiorari was filed on September 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether mandamus will lie to compel a district court to decide in advance of trial whether material on which an indictment was based is obscene.

STATEMENT

On March 24, 1965, a twenty-five count indictment was returned against petitioners in the United States District Court for the Northern District of Iowa charging a conspiracy to violate the federal obscenity laws and substantive violations thereof (18 U.S.C. 371, 1461, 1462) (R. 10-39). In their pre-trial motion to dismiss, petitioners requested the district court to decide whether the books and magazines enumerated in the indictment were, as a matter of law, not obscene (R. 40-48). The court refused to decide the issue at that preliminary stage, pointing out that such a "delicate constitutional judgment" cannot be made "at a high level of abstraction" (Pet. App. B 5) but only after all the relevant evidence necessary for resolution of the question has been adduced at trial. The court further stressed that for it to make such a threshold ruling would mean that an appellate court would have to review the case "on a record devoid of

evidence" (Pet. App. B 5) and that, in essence, to grant petitioners' request would turn a motion to dismiss an indictment into "a device for a summary trial of the evidence" (Pet. App. B 3).

The court of appeals dismissed a petition for a writ of mandamus to compel the district court to decide the issue (Pet. App. A). The case is presently set for trial on October 18, 1965 (R. 58).[2]

ARGUMENT

In essence, petitioners' argument is that a defendant is entitled as of right to a pre-trial resolution of the question whether there is sufficient evidence to warrant submission of the issue of obscenity to the jury. That is the necessary premise of their claim that mandamus is available to compel the district court to make such an advance ruling. In our view, the premise is unsound.

1. In refusing to make an advance decision, the court followed the usual rule that, on a motion to dismiss, the sufficiency of an indictment must be determined not from external evidence, but from the face of the indictment itself; and that all well-pleaded facts contained therein are taken to be true. See generally, *United States* v. *Sampson*, 371 U.S. 75, 79; *United States* v. *South Florida Asphalt Co.*, 329 F.2d 860, 865 (C.A. 5), certiorari denied *sub. nom. R. H. Wright, Inc.* v. *United States*, 379 U.S. 880; *Padilla* v. *United States*, 278 F.2d 188, 190 (C.A. 5). Cf. *Rus-*

[2] On October 8, 1965, Mr. Justice White denied an application for a stay of the district court proceedings.

sell v. *United States*, 369 U.S. 749, 770-771. A party to a lawsuit is not entitled to an advisory opinion founded on evidence not yet introduced and on issues not yet refined and sharpened by trial. See *United States* v. *Fruehauf*, 365 U.S. 146, 157-159. We may assume that a court has *power* to make the initial determination here sought on the basis of the books and magazines charged in the indictment and informally submitted to the district court. See *United States* v. *Halseth*, 342 U.S. 277, 278-279; but cf. *United States* v. *Fruehauf*, 365 U.S. 146, 158. But this does not render a refusal to make such a preliminary determination an abuse of discretion. The trial court concluded that an immediate ruling would improperly anticipate "that the evidence would not prove the offense charged" and would, on appeal, require an appellate court to base its "decision on a record devoid of evidence" (Pet. App. B 5). The problems of applying to particular facts the standards laid down by this Court with respect to charges of obscenity are not simple. See *Roth* v. *United States*, 354 U.S. 476; *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (opinion of Harlan, J.); *Jacobellis* v. *Ohio*, 378 U.S. 184 (opinion of Brennan, J.). A trial judge can hardly be criticized—much less characterized as arbitrary—if he chooses to pretermit resolution of these difficult issues until after the government has made out its case in the formal and solemn atmosphere of an adversary trial.

Rule 12(b)(4), F.R. Crim. P., specifically grants such discretion, providing in pertinent part that:

> A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. * * *

The language of this Court in *United States* v. *Fruehauf*, 365 U.S. 146, 157, is equally applicable here:

> Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests, we have consistently refused to give. * * *

2. Petitioners misread the decisions of this Court when they argue (Pet. 8-9) that district courts have a "constitutional obligation" to decide the question of obscenity when raised in a pre-trial motion to dismiss an indictment. No decision of this Court has undercut the underlying rationale of *Roth* v. *United States*, *supra*, that, as a normal matter, it is for the jury, in the first instance, to decide the issue. The plurality opinion in *Jacobellis* v. *Ohio*, 378 U.S. 184, does not establish the contrary. Rather, in spelling out the role of this Court in obscenity cases the opinion rejects only the doctrine that a jury finding of obscenity "is all but conclusive," "with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence.'" 378 U.S. 187. This does not

mean that a constitutional decision *must* be made *before* trial irrespective of the view of the district court that the matter is not yet ripe for decision.[5]

Equally without persuasive force is petitioner's assertion that an immediate ruling is necessary because the "very institution of criminal or civil proceedings have chilling effect on protected expression" (Pet. 9-10). The constitutionality of obscenity legislation has been recently upheld (*Roth* v. *United States*, 354 U.S. 476), and the only issue here is whether the material challenged is obscene within the intendment of that legislation. A prompt trial in which the issues are fully explored is surely the normal and effective means of making that kind of determination.

3. For the reasons set forth above, this case does not meet the stringent requirements which would warrant resort to the extraordinary writ of mandamus, a remedy "reserved for really extraordinary cases," *Ex parte Fahey*, 332 U.S. 258, 259-260, and used only to "confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is the duty to do so," *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26. See, also, *Schlagenhauf* v. *Holder*, 379 U.S. 104, 109-110; *Platt* v. *Minnesota Mining Company*, 376 U.S. 240, 245.

The mere claim of constitutional overtones does not require resort to the writ. See *Cobbledick* v. *United States*, 309 U.S. 323, 325-326. Nor is petitioners'

[5] The fact that some courts have chosen to make a preliminary determination is therefore no authority for the proposition that a court must make such a determination.

position advanced by the claim that they would suffer hardship by a trial in the Northern District of Iowa (where venue was properly laid because the books were sent there).[4] As this Court also pointed out in *Cobbledick* v. *United States*, *supra*, 309 U.S. at 325: "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." Moreover, the Court has frequently admonished that "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *Di Bella* v. *United States*, 369 U.S. 121, 126; *Parr* v. *United States*, 351 U.S. 513, 519-520. There is no compelling reason to permit an intermediate appeal in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of ceritorari be denied.

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October 1965

[4] The question of transfer which was raised by pre-trial motion was decided against petitioners after exhaustive analysis by the district court (see 243 F. Supp. 160, 173-178).

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